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I HAVE THIS GREAT DOCTOR YOU GOTTA SEE

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In most personal injury actions the plaintiff is served with a Notice for an Independent Medical Examination pursuant to C.C.P 2031 a.k.a. "the defense medical." It has become so common place that no one really thinks twice about the procedure. However, here are some interesting twists and turns to the run of the mill Notice of IME that we have encountered that may make you take a second look at that IME notice you were just served with.

Scenario #1: *Plaintiff was injured on a construction site when a crane hook hit him on the side of the face. Plaintiff brought a personal injury action against the third party. In his answer to Form Interrogatory 6.1, plaintiff stated that he suffered a fractured skull, fractured jaw, migraines, hearing loss, vision loss and two broken teeth due to the incident. Upon receipt of the interrogatory answers, defendant noticed independent medical examinations with a neurologist, optholmologist, ear nose and throat doctor and an oral surgeon. Plaintiff objected.*

Pursuant to C.C.P. Section 2032(c)(2) a defendant in a personal injury case has the right to one physical examination of the plaintiff without leave of court simply by serving a written demand on plaintiff. The only requirement is that the physical examination must be limited to whatever portion of plaintiff's body or conditions that are "in controversy" in the lawsuit.

However, if the same defendant wants plaintiff examined by a second doctor, he must obtain a court order based on a showing of good cause. C.C.P. Section 2032(d). In ***Shapira v. Superior Court* (1990) 224 CA 3d 1249**, 1255 the court stated "(n)owhere does the Legislature specifically limit the number of available examinations, either mental or physical." Yet, the requirement of good cause "is not a mere formality" that may be "met by mere conclusory allegations" ***California Civil Discovery***, James Hogan (Bancroft Whitney 1997) Section 8:6 citing ***Schlagenhauf v. Holder*** (1964) 379 US 104, 118. Showing of good cause must be established and can easily be established in a variety of ways. Sometimes the pleadings themselves which allege physical and mental injuries provide the basis of good cause. Another is to determine what

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specialists the plaintiff has seen or will be calling as an expert at trial. ***California Civil Discovery*** Section 8:8 cites language from a federal case that states "Unless [its ophthalmologist] is likewise allowed to examine the plaintiff, the defendant will be at a distinct disadvantage in this "battle of experts" at trial... Because the plaintiff has permitted [his own ophthalmologist] to examine him, fundamental fairness dictates that he now allow [a defense ophthalmologist] to do so also. Another way is to list the nature and extent of the injuries of the injuries alleged coupled with the high degree of specialization in modern medicine. This often supplies "good cause" to order a party to submit to a battery of examinations. ***California Civil Discovery***, James Hogan (Bancroft Whitney 1997) Section 8:8. The court of appeal in ***Shapira v. Superior Court* (1990) 224 CA 3d 1249,** held that a defendant who had already had the plaintiff be seen by a neurologist and a neuropsychologist could still show good cause" for an examination by a psychiatrist. The court went on to say "Nowhere does the Legislature specifically limit the number of available examinations, either mental or physical." ***Shaipria v. Superior Court***, ***supra*** at 1255.

Scenario #2: *Plaintiff, a world class surfer, has filed a multi-million dollar claim against a maker of sun screen alleging that their product caused burns to his skin and make his skin so sensitive too saltwater that he is no longer able to compete in surfing competitions. Defendant served a Notice of IME stating that the "patch testing will be performed applying the subject product in the appropriate proportions." Plaintiff timely objected to the examination on the grounds that the diagnostic test requested is "painful, protrusive and protracted and thus violates C.C.P. Section 2032. Defendant brings a motion to compel the IME.*

The California courts have not yet dealt with the issue in a published opinion.[1] Whether or not the testing itself is painful, protracted and intrusive within the meaning of C.C.P. §2032(c)(2) is still in issue. ***California Civil Discovery, supra*** §8.7 cite examples of what courts have allowed in an independent medical examination -- ***Abex Corp. v. Superior*** Court (1989) 209 Cal. App. 3d. 755, 758 (biopsy allowed); ***Sullivan, Long &***

[1]However, one of Katherine Gallo's recommendations to the court in her capacity as a court appointed discovery referee was overturned by the First District Court of Appeal in an unpublished decision using the balancing test analysis of ***Lefkowitz v. Nassau County Medical Center (N.Y. App. Div. 1983) 462 N.Y.S. 2d 903*** and ***Stasiak v. Illinois Valley Community Hospital*** (1992, Ill App) 590 NE2d 974, 978.

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Haggerty, Inc. v. Washington (1942, CA5 La) 128 F2d 466 [x-ray examination using lipoidol]; ***Riss & Co. v. Galloway*** (1941, Colo.) 114 P2d 550, [spinal tap]; ***Burns v. Aetna Life Ins. Co.*** (1933, Mont.) 26 P2d 175 [periodic immersion of injured hand into hot water]; ***United States Fidelity & Guaranty Co.*** (1919 Neb.) 173 NW 689 [x-ray procedure requiring injection of contrast substance into the kidney]; ***Cardinal v. University of Rochester*** (1946, Misc) 71 NYS2d 614 [bone marrow biopsy; ***Carrig v Oakes*** (1940, App Div.) 18 NYS2d 917 [cystoscopic examination of a female plaintiff]; ***Bartoletta v. Delco Appliance Cor.*** (1938 App. Div.) 4 NYS2d 744 [stomach examination requiring consumption of barium meal].

California Civil Discovery, James Hogan (Bancroft Whitney 1997) Section 8:8 states that "California courts, faced with a motion for a painful or dangerous type of medical test should consider the practice adopted in New York and Illinois for balancing 'the competing interests of the defendant to investigate and completely satisfy his curiosity by generally accepted medical tests and the plaintiff's interest in his own safety and comfort given the risks of a particular procedure.' Citing ***Stasiak v. Illinois Valley Community Hospital*** (1992, Ill App) 590 NE2d 974, 978. In the states that apply a balancing test require that the examinee concerned about the pain or risk of a requested diagnostic procedure support his or her objection with declarations of physicians or excerpts from recognized medical tests describing the pain or dangers posed. (See ***Stasiak, supra***, 590 N.E. 2d at p 975[physicians' affidavits]; ***Lefkowitz, supra*** 462 N.Y.S. 2d at p 905 [excerpts from Physicians' Desk Reference and gynecology textbook].) Once the prima facie showing has been made, it shifts the burden to the defendant to establish the clear probative value of the proposed examination to the ultimate issues in the case. (***Stasiak***, at p. 978)

Scenario #3: *Plaintiff, a fifteen year old student, filed a lawsuit against the local high school, the high school principal and one of the teachers claiming she was repeatedly molested by her high school teacher. Plaintiff's complaint states that she has suffered "great mental pain and suffering" resulting from the incident. In her answers to interrogatories, she also states that she is "fearful of men*." *One of the defendants files a motion for a mental examination requesting that Dr. Doe, a male psychiatrist, examine plaintiff pursuant to C.C.P. Section 2032(d). Plaintiff counsel adamantly objects to the mental examination on several grounds including (1) plaintiff not mentally able to attend examination (plaintiff provides the appropriate declarations from her physicians delineating examples of her fragile emotional state); (2) not Dr. Doe, as he is a male*

and (3) if the court is inclined to allow the IME to go forward then plaintiff wants to be present during the IME. What is the court inclined to do?

This is a difficult scenario that many law and motions have had to deal with on at least one occasion. When a plaintiff has been so damaged by an incident, special precautions and creative solutions have come out of the law and motion department. However, there are statutory provisions that must be adhered to.

First, plaintiff can avoid a mental examination by stipulating that "(1) no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed, and (2) no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages." Yet, it may be unfair to force plaintiff to make that tactical decision when by her own doctors' declarations state she is in a fragile emotional state. The parties can stipulate or the court can order a trigger date, such as 150 days before trial, as to when plaintiff must advise the parties and the court that she (1) pursue a claim for mental and emotional distress over and above that usually associated with the physical injuries claimed, (2) will present expert testimony regarding such claim at trial in support thereof and (3) upon giving notice of his intent to pursue a psychiatric/psychological claim, plaintiff shall also indicate the nature of the psychiatric diagnosis alleged, so that the defendants and cross-defendant(s) may have some guidance in the selection of an appropriate health care practitioner. The stipulation and/or order can also list put all the procedural guidelines in place so that the mental IME can go forward with no glitches if plaintiff elects to pursue her claim for mental and emotion distress.

Plaintiff's second objection could be sustained. According to C.C.P. Section 2032(b) a mental examination may be conducted by either a license physician, or a licensed psychologist with a doctoral degree and at least 5 years experience diagnosing mental and emotional disorders. Theoretically, in ordering a medical examination, the court could appoint whomever it chooses, however, as a practical matter, courts almost always appoint the physician requested by the moving party. Weil and Brown Civil Procedure Before Trial Section 1:1573 citing ***Edwards v. Sup. Ct.*** (1976) 16 C3d 905, 912-913. Nonetheless, if good cause exists for refusing the moving party's choice, the court has the discretion to appoint someone else. ***Edwards v. Sup Ct., supra.***

In regards to plaintiff's third objection, C.C.P. Section 2032(g)(2) is very explicit--

"nothing in this article shall be construed to alter, amend or affect existing case law with respect to the presence of the attorney for the examinee or other persons during the (mental examination)...." Case law has recognized the special need for rapport between the examiner and examinee during a mental examination. The presence of counsel or a court reporter might hinder the examiner's ability to establish a rapport with the examinee and thereby impair the effectiveness of the examination. Weil and Brown Civil Procedure Before Trial Section 1:1573 citing ***Edwards v. Sup. Ct.*** (1976) 16 C3d 905, 912-913. However, the code does specifically authorize recording of mental examinations. In ***Vinson v. Superior Court*** (1987) 43 C3d 833, 844-845 the California Supreme Court stated that "trial courts retain the power to permit the presence of counsel or take other prophylactic measures when needed." Using this language superior courts have authorized the use of two way mirrors and audio feeds into adjoining rooms in order to allow plaintiff counsel and the court to monitor the mental examination.

Scenario #4: *Plaintiff, 26 year old insurance adjuster, was involved in a serious auto accident which left him a quadriplegic. In plaintiff's expert disclosure he stated that he will call as an expert a vocational rehabilitationist to testify as to plaintiff's job potential and earning capabilities for the next 29 years. The vocational rehabilitationist's report states that he interviewed plaintiff for approximately 4 hours and had the tested the plaintiff for job aptitude for approximately 4 hours. Defendant immediately serves a Notice of Examination for plaintiff to be seen by his vocational rehabilitationist pursuant to C.C.P. Section 2032. Plaintiff objects.*

In a pre-1986 Discovery Act Case, the First District Court of Appeal in ***Browne v. Superior Court*** (1979) 98 Cal. App. 3d, 610, 615 held that " since a vocational rehabilitation counselor is not a licensed physician, no affirmative authority exists under the subject statute, or otherwise, to conduct the proposed physical examination." The court went on to say "(w)hether such an examination by a qualified vocational rehabilitation counselor should be permitted in the first instance is a matter for the Legislature to determine and not the courts." ***Browne v. Superior Court , supra*** at 616. Since the 1986 Discovery Act did not change the result **in *Browne v. Superior Court*** an exam by a vocational rehabilitationist under C.C.P. Section 2032 will not be allowed.